

International Law and the Recognition of Israeli Sovereignty in the Golan Heights

Prepared written testimony of

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Chairman DeSantis, Ranking Member Lynch, and honorable members of the Subcommittee, I am honored to be invited to testify before you today on the potential recognition by the United States of Israeli sovereignty over the Golan Heights. I will focus my testimony on the international legality of Israel's sovereign claims, and possible U.S. recognition, and add a few words about the errors of the foreign policy conventional wisdom in these matters.

I am a professor at Northwestern Pritzker School of Law, but am moving to George Mason University's Antonin Scalia School of Law next month. I also head the international law department at the Kohelet Policy Forum, a Jerusalem think tank. I have researched and written extensively on the legal and diplomatic aspects of the Arab-Israeli conflict, with articles published in major peer reviewed publications. I have testified numerous times before Congress, including this committee, as well as the Israeli Knesset, and the European Parliament.

I. The Legality of defensive conquest.

The widely-repeated view that recognizing Israeli sovereignty over the Golan Heights would be contrary to international law is based on one fundamental assumption: that at least since the adoption of U.N. Charter, international law prohibits *any* acquisition of foreign territory by force. While such a formulation of the rule is largely accurate, it omits crucial exceptions quite relevant to the case of the Golan Heights.

Whatever the current status of an absolute prohibition on territorial change resulting from war, there was certainly no such blanket prohibition in 1967, when the territory came under Israeli control. At the time, international law only prohibited acquisition of force in *illegal or aggressive* wars. This is evident from the source of the prohibition in the UN Charter, post-Charter state

practice, and the understandings of international jurists at the time. There is simply no precedent or authoritative source for forbidding defensive conquest in 1967.

The U.N. Charter prohibits war for most purposes. When the use of force is illegal, it is natural to conclude that any territorial gains from such aggression cannot be recognized as well. Thus the illegality of conquest arises from the presumptive illegality of the use of force. But crucially, the U.N. Charter does not make *all* war illegal. Indeed, it expressly reaffirms the legality of a defensive war. Since defensive war is not illegal, it follows that the defender's territorial gains from such a war would not be illegal.

A. Defensive conquest circa 1967

The fundamental legal question is whether the law as it stood in 1967 clearly barred territorial changes resulting from the legal use of force. To answer that, we must see how the state practice, and leading jurists, answered that question after the adoption of the U.N Charter and before 1967.¹

1. *The International Law Commission and leading scholars*

The legality of defensive conquest was endorsed by the International Law Commission, a body created by the General Assembly, and tasked with providing fuller explanations of the legal significance of the U.N. Charter and related documents. Composed of some of the most distinguished jurists of the time, its work in the immediate post-War period is seen as providing highly authoritative explanations of the UN Charter. In the ILC's drafting of their influential Draft Convention on the Rights and Duties of States (1949) and Draft Code of Offenses Against the Peace and Security of Mankind (1954), the question of the permissible scope of territorial conquest came up repeatedly.

The ILC repeatedly recognized that not all territorial changes in war are illegitimate. Not all annexations were bad, the U.S. delegate argued. All agreed that post-war frontier adjustments were justified to help protect the victim of aggression. There was broad consensus territorial change was only impermissible in a war of "aggression." Thus the final document provided that states have a duty "to refrain from recognizing any territorial acquisition by another State acting in violation" of the U.N. Charter or other international law rules. But Israel's use of force in 1967 was defensive – certainly the U.S. is entitled to view it as such – and thus explicitly lawful under the Charter. Thus there is no obligation to refrain from recognizing it.

Furthermore, the leading international law treatises immediately prior to 1967 reveal a disagreement between leading authorities such as Hersch Lauterpacht and Robert Jennings on whether defensive conquest was proper under the UN Charter. The majority opinion seems to side with the permissive view, but both sides acknowledged that the matter was disputed, and a clear rule had not emerged.

¹ The evidence and analysis presented here draws heavily from my article, *Resolution 242 Revisited: New Evidence on the Required Scope of Israeli Withdrawal*, 16 CHICAGO JOURNAL OF INTERNATIONAL LAW 127 (2015), where a fuller presentation, and citations to the relevant sources, can be found.

2. *State practice, 1945-67*

The views of the U.N.'s International Law Commission and most scholars in finding defensive conquest as lawful under the U.N. Charter should not be surprising given that it simply reflected broad state practice under the Charter. In the years immediately following the adoption of the Charter, many of the victorious Allies took territory of the defeated nations. All these annexations have been recognized, without controversy by the U.S. and international community. To mention only a few of these instances, Holland unilaterally annexed parts of Germany in 1949; Greece and Yugoslavia took parts of Italy; the U.S.S.R and Poland annexed large parts of Germany. The ILC in its deliberations specifically addressed the legal basis for these annexations: because the underlying use of force was lawful (defensive), the acquisition of territory can be permitted.

Nor did this practice stop with the immediate aftermath of WWII in the 1940s. At the close of the Korean War in 1953, the Republic of Korea controlled and claimed sovereignty of portions of territory north of the pre-war boundary at the 38th parallel. Nonetheless, the U.S. and the international community has not seen any obstacle to recognizing Seoul's sovereignty over this territory. Most recently, both Congress² and the Executive³ have recognized Israeli sovereignty over a unified Jerusalem, though parts of the city, like the Golan Heights, only came under Israeli control in 1967. (To be sure, Israel has several other legal grounds for asserting sovereignty over Jerusalem aside from defensive conquest, such as prior title.⁴)

An examination of state practice and international legal opinion shows that international law did not prohibit, and may even have affirmatively sanctioned, defensive conquest as of 1967. The lack of clarity is itself important, because in international law there is a meta-principle dealing with situations where it is not clear whether a rule has emerged. Known as the *Lotus* Principle, the rule is that when it is not clear whether an international law rule has emerged, states remain free to act.⁵ That is, the burden of proof is on those seeking to demonstrate the existence of a rule that would limit sovereign action. That which is not clearly prohibited is permitted.⁶

It is not necessary to consider whether any norm prohibiting defensive conquest emerged subsequently to Israel's actual conquest of these territories. Under the doctrine of intertemporal law, subsequent developments in international law do not change the status of developments that occurred before those changes. That is, international law is non-retroactive, and this is most emphatically true for questions of territorial sovereignty and conquest, where any other principle would lead to chaos in international relations.⁷

Finally, it must be observed that there are other cases where territorial annexation resulting from the use of force has resulted in widely-recognized changes in sovereignty *even absent any*

² See Jerusalem Embassy Act, Pub. L. 104-45 (Nov. 8, 1995).

³ See Eugene Kontorovich, *America Recognizes One Jerusalem*, WALL STREET JOURNAL (May 12, 2018).

⁴ See Avi Bell & Eugene Kontorovich, *Palestine, Uti Possidetis Juris and the Borders of Israel*, 58 ARIZONA LAW REVIEW 633-92 (2016).

⁵ S.S. "Lotus", France v Turkey, Judgment, (1927) PCIJ Series A no 10, ICGJ 248 (PCIJ 1927), 7th September 1927.

⁶ See Daniel Bodansky, *Non Liqueur and the Rule of Law*, in INTERNATIONAL LAW AT THE CLOSE OF THE 20TH CENTURY: THE NUCLEAR WEAPONS ADVISORY OPINION, 161 (Cambridge University Press, 1999).

⁷ See MALCOLM SHAW, INTERNATIONAL LAW, 8TH ED. 377 (Cambridge 2017).

plausible claim of self-defense. Of course, Israel's control of the Golan did not arise in war of conquest or aggression, but one of defense and necessity. The discussion here of offensive conquest is only intended to underscore the point that one cannot take statements about non-recognition requirements as absolutes.

For example, the U.S. and the international community recognizes the Socialist Republic of Vietnam as sovereign over both north and south Vietnam, though of course it conquered much of it in an aggressive war against the Republic of Vietnam. Yet when the U.S. restored diplomatic relations with Hanoi under President Clinton, it fully recognized its sovereignty over the entire South. In another famous example, India invaded and annexed the sovereign Portuguese territory of Goa and other territories in 1961. While the United States strongly condemned this action, and scholars widely regard it is illegal, the international community eventually came to accept Indian sovereignty over the territory.

The Vietnamese and Goan cases do not fit in any neat doctrinal boxes: their conquest was certainly illegal. But international law clearly allows, in practice, for some flexibility or nuance in applying the rule against offensive conquest, though such exceptions must be quite narrow. For example, the main argument in favor of India turned on the illegitimacy of Portuguese rule. That argument would seem to apply *a fortiori* to Syria, a state whose extraordinary actions over the past six years have attached to it a level of international illegitimacy that is hard to match.

B. Policy arguments

Many contemporary scholars argue against defensive conquest on policy grounds. Allowing for so-called “defensive conquest” would encourage countries to undertake aggressive campaigns of conquest under the pretext of self-defense. But self-defense is already clearly authorized by the U.N. Charter, and is frequently invoked as a pretext by aggressors. It is up to members of the international community, including the U.S., to exercise their judgement as to whether the underlying use of force is lawful. If defense cannot in practice be distinguished from aggression, then this is a failing of the entire U.N. Charter. The Charter's entire security system depends on being able to distinguish between aggression and self-defense.⁸

But the policy arguments for allowing for defensive conquest are compelling. Without such a possibility, an attempted aggressor is insured against significant negative consequences. Territorial expansionism becomes a no-lose game, because aggressors will always at least break even. In short, the lack of any self-help sanctions serves as a license and inducement to aggressors, especially in the absence of a unified international security regime of the kind the Charter originally envisaged.

Furthermore, it is hard to believe that a rogue regime that would not respect the basic norm against aggression would be marginally deterred by a corollary prohibiting its acquisition of force through such unlawful action. In practice, what stops aggressors from engaging in conquest (or emplacing puppet regimes) is forcible resistance by the victim, with backing by the

⁸ Thus the U.S. and other countries distinguish between the lawfulness of the circumstances under which the Golan fell under Israeli control, and, for example, the circumstances under which Crimea fell under Russian control. The ability to make that distinction suggests it can be extended to the consequences of the control.

international community. A rule against defensive conquest only works to limit the scope of allowable resistance by the victim state.

Many would say that Israel's ongoing de facto control of the Golan is lawful, but its sovereignty cannot be recognized. Again, this effectively punishes the victim. Even a rule allowing a defender to occupy territory seized in a defensive war indefinitely (until a genuinely peaceable regime emerges on the other side) - but without asserting sovereignty - is costly to the defender. This means the defending state controls the territory for decades, investing in its infrastructure, supporting its population, and so forth, but must be willing to forfeit all this at a moment's notice. One might say a reasonable and equitable rule would place the fault for failing to secure peace on the aggressor state after some period of time -certainly after 50 years - and thus waive any residual claim it has.

II. The disproven foreign policy consensus on Jerusalem and the Golan

Even discussing Israeli sovereignty over the Golan purely from a legal perspective goes sharply against the grain of consensus among Middle East experts. The conventional view is that Israel must at some point return the Golan Heights to the Syrian Arab Republic. Many will likely argue that recognition would harm U.S. relations with the Arab world, or be "destabilizing." Thus in closing, a few observations are in order about the value of the accepted wisdom in these matters.

It is useful to recall the debate over moving the U.S. Embassy to Jerusalem, about which I had the honor to testify before this committee less than a year ago.⁹ The conventional foreign policy wisdom at the time was that such an action would lead to an eruption of violence in Jerusalem, and threaten the security of U.S. missions and citizens around the world. Those predictions proved, thankfully, spectacularly wrong, in a way that should cast serious doubt on the predictive power of Middle East expertise.

The same degree of systematic error can be observed in the foreign policy establishment's recommendations regarding Israel and Syria. Less than a decade ago, the conventional wisdom of the foreign policy establishment was that Israel should return the Golan Heights to Syria in a peace deal.

Not only would an Israeli withdrawal make peace between the two countries, the story went, it would get Damascus to break its alliance with Iran. The views of Amb. Martin Indyk in a 2010 New York Times op-ed were typical:

*Today, nothing could better help Obama to isolate Iran than for Netanyahu to offer to cede the Golan. . . Netanyahu must make a choice: take on the president of the United States, or take on his right wing.*¹⁰

This position was standard. Indeed, never were experts more confident that Assad was a partner for peace than in the years just prior to his campaign of systematic ethnic cleansing and gassing of his own population. In 2009, a blue-ribbon panel that that included Zbigniew Brzezinski,

⁹ *U.S. Policy on Israel Held Hostage by Threats and Outdated Arguments*, testimony before the U.S. House Committee on Oversight, Subcommittee on National Security (Nov. 7, 2017).

¹⁰ Martin S. Indyk, *When Your Best Friend Gets Angry*, NEW YORK TIMES (April 29, 2010).

Chuck Hagel, Lee Hamilton, Brent Scowcroft and others released a report about the “last chance” for peace. Among other things, it recommended that the U.S push for a full Israeli withdrawal from the Golan to “fundamentally transform the regional landscape and ultimately detach Damascus from its uneasy strategic partnership with Iran.”¹¹

In the same vein, Richard Haass, the head of the Council on Foreign Relations, painted this rosy picture:

Israel's security could be further buttressed by demilitarizing the territory returned to Syria. Technology could provide early-warning systems. Peacekeepers (possibly American) could be stationed there, much as they are in the Sinai to buttress the peace between Israel and Egypt. And the Syrian leadership is sufficiently strong that it could live up to security commitments.”¹²

Today, every aspect of the assumptions behind these suggestions has been entirely discredited. Firstly, Assad is not and never was a peacemaker. The notion that he would abide by a deal with Israel any more than the countless ceasefires, chemical weapons agreements and treaties, and basic international commitments that he has flouted in the past seven years strains credulity.

Second, his alliance with Iran is not a bad relationship he stumbled into, but rather his greatest strategic asset. Iran has ensured the survival of his regime and family when most others countries would turn away in disgust: that is not an alliance he would give up for the Golan.

As for peacekeepers in a possible peace deal, the U.N. peacekeepers already stationed in the Golan fled their positions at the outbreak of the civil war. The demilitarized zone between Israel and Syria – the fruit of earlier diplomatic accords - has been remilitarized by both Assad and rebel groups. Nor have U.S. allies in Syria, such as the Kurds, been able to rely much on direct U.S. backing when the going gets tough. Thus the peace deal widely favored just a few years ago by leading policy experts would have expanded Assad’s power and threatened Israel – for naught.

The profound and demonstrable error of the foreign policy consensus in these matters – from Jerusalem to the Golan – is something that must be taken into account going forward. It suggests that in charting future policy, the U.S. should not be guided by the same hollow certitudes. In the wake of these serious misjudgments by leading Middle East professionals, it would behoove the U.S. to look in totally different directions for solutions. Just as many said “now is not the right time” to move the embassy, a similar refrain will be heard about the Golan. But now – in the wake of falsely positive predictions about the nature of the Assad regime and falsely negative ones about the consequences of moving the embassy to Israel – it is the right time to seek entirely new paradigms in these matters. Recognizing Israeli sovereignty over the Golan is a start.

Thank you for giving me the opportunity to address these issues, and I welcome your questions.

¹¹ U.S./Middle East Peace Project, *A Last Chance for A Two-State Israel-Palestine Agreement*.

¹² Richard H. Haas, [Obama Needs to Talk to Damascus Now](#), NEWSWEEK, (Feb. 27,2009).